

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1475

COMMONWEALTH

vs.

ARISMENDY B. LARA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The Commonwealth brings this interlocutory appeal after a judge in the Boston Municipal Court allowed the defendant's motion to suppress evidence seized as the result of a search warrant, on the ground that the affidavit failed to provide sufficient information to establish an informant's basis of knowledge or veracity. The Commonwealth asserts that three police-supervised controlled buys of heroin from the defendant were sufficient to establish probable cause for the issuance of the search warrant. We agree, and reverse.

1. Controlled buys and probable cause. "[O]ur inquiry as to the sufficiency of the search warrant application always begins and ends with the 'four corners of the affidavit.'" Commonwealth v. O'Day, 440 Mass. 296, 297 (2003), quoting Commonwealth v. Villella, 39 Mass. App. Ct. 426, 428 (1995).

"When an application for a warrant depends in significant part on information provided by a confidential informant, the affidavit must 'apprise the magistrate of (1) some of the underlying circumstances from which the informant concluded that contraband was where he claimed it was (the basis of knowledge test), and (2) some of the underlying circumstances from which the affiant concluded that the informant was credible or the information reliable (the veracity test).' . . . Each of these tests must be satisfied independently, but 'police corroboration of an informant's detailed tip can compensate for deficiencies in either or both prongs of the standard, and thus satisfy the [Massachusetts Declaration of Rights] art. 14 probable cause requirement." Commonwealth v. Desper, 419 Mass. 163, 166 (1994), quoting Commonwealth v. Warren, 418 Mass. 86, 88-89 (1994).

In the present matter, the search warrant application requested the issuance of a search warrant for the defendant's person and a white 2002 Suzuki SUV. The affiant recited that members of the Boston police drug control unit were working with a confidential informant (CI), who reported that a brown-skinned Hispanic male, whom he later identified as the defendant, was operating a 2002 white Suzuki SUV, Massachusetts registration number 5RN694, and making deliveries of heroin in Dorchester. The CI provided officers with a physical description of the

defendant, his first name, place of work, and cell phone number, and reported that the defendant carried large amounts of cocaine and heroin on his person and hidden in his white SUV. As part of their investigation, members of the drug control unit conducted three separate controlled buys with the CI. Prior to each controlled buy, the CI contacted the defendant, arranged a meeting location, and was brought to this location by an officer. The CI was searched prior to each buy to ensure that he did not have any money or contraband, and was given a certain amount of money to use in the transaction. In the first controlled buy, officers observed the white SUV, with the predicted license plate number, arrive at the meeting location and watched the CI approach the vehicle and stand near the driver's side. Officers saw the driver reach near the vehicle's sun visor and engage in a hand-to-hand exchange with the CI. Officers then observed the CI return to their predetermined location. The second controlled buy was performed in the same manner, but officers specifically saw the defendant reach into his front pants pocket prior to engaging in a hand-to-hand exchange with the CI. Sometime after this controlled buy, the CI informed officers that he observed between two hundred and three hundred bags of heroin in the defendant's possession. In the third controlled buy, the CI was observed approaching the driver's side of the white SUV, and walking away from the white

SUV a short time later. What officers believed to be heroin was retrieved from the CI after each purchase, and each time the CI reported the defendant as the dealer.

"It is well settled that a controlled buy supervised by police provides probable cause to issue a search warrant." Villella, 39 Mass. App. Ct. at 427. Here, the three controlled buys and the police observations compensated for any deficiencies in the CI's basis of knowledge or veracity and provided the necessary linkage between suspected drug-dealing activities and the defendant. See Commonwealth v. Valdez, 402 Mass. 65, 71 (1988) ("The police surveillance, in sum, lent credence to the informant and his statements, thereby remedying any arguable deficiency regarding the second prong of the Aguilar-Spinelli^[1] standard"); Commonwealth v. Colon, 80 Mass. App. Ct. 162, 166 n.8 (2011) ("To the extent that any defects in [the confidential informants'] basis of knowledge or reliability existed, they were cured by police corroboration"). Contrary to the defendant's argument, each controlled buy followed the proper procedure. See Desper, 419 Mass. at 168. The defendant's argument concerning the first controlled buy not being properly monitored is also without merit, as the affiant stated that after arranging the first buy in the presence of the

¹ See Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969).

officers, the CI, was "taken to the meeting location," where the CI "was observed waiting." This is enough to show that the CI was observed by police officers during the first controlled buy. The defendant's arguments regarding a lack of specific details, and corroboration of every detail provided by the CI, is also without merit, as certainty is not required when establishing probable cause. See Warren, 418 Mass. at 90 ("Probable cause does not require a showing that the police had resolved all their doubts" [citation omitted]). The three controlled buys sufficiently corroborated the information provided by the CI.

Therefore, the affidavit established probable cause that the defendant was in possession of drugs and operating a drug delivery service from the white SUV. See Commonwealth v. Monteiro, 93 Mass. App. Ct. 478, 483-484 (2018); Commonwealth v. Figueroa, 74 Mass. App. Ct. 784, 787-788 (2009) ("Without question, a properly monitored controlled purchase of illegal drugs provides sufficient corroborating evidence to overcome any shortfalls in meeting the constitutional reliability requirements imposed on confidential informants"), S.C., 77 Mass. App. Ct. 1117 (2010) (reversing on other grounds).

2. Nexus and timeliness. The defendant also raises arguments concerning nexus and staleness. Where these arguments are raised for the first time on appeal, they are deemed waived. See Commonwealth v. Barnes, 399 Mass. 385, 393-394 (1987);

Commonwealth v. Johnston, 60 Mass. App. Ct. 13, 20 (2003).

Regardless, the defendant fares no better on the merits. First, the affidavit provided a sufficient nexus between drug distribution crimes and the defendant's person. Officers observed three controlled buys, and in two of these, observed a hand-to-hand exchange between the CI and the driver of the white SUV. When debriefing with the officers after each purchase, the CI reported that the dealer was in fact the defendant. The CI also informed officers that the defendant carried large amounts of heroin and cocaine on his person, and reported that he had seen the defendant with hundreds of bags of heroin weeks prior to the issuance of the warrant. This information "provide[d] a substantial basis for concluding that evidence connected to the crime [would] be found on the [defendant]." Commonwealth v. Donahue, 430 Mass. 710, 712 (2000).

Second, we disagree with the defendant's contention that the warrant was not timely executed. Facts contained in an affidavit must be "closely related to the time of the issue of the warrant [so] as to justify a finding of probable cause at that time" (citation omitted). Commonwealth v. Cruz, 430 Mass. 838, 843 (2000). Where the investigation involves continuous conduct, however, "time is of less significance" (citation omitted). Commonwealth v. Vynorius, 369 Mass. 17, 25 (1975). Given the series of controlled buys that extended over the

course of two weeks, and given that the warrant application was submitted about four days following the third controlled buy, the information was not stale.² The transitory nature of drug transactions is overcome by the extended time period during which the presence of drugs remained probable. See Commonwealth v. Rodriguez, 49 Mass. App. Ct. 664, 668-669 (2000) (sufficient probable cause where "[t]he informant's personal observation was . . . coupled with other information furnished by the informant recited in the affidavit, namely that the defendant 'is selling' and 'has been selling heroin for sometime now'"). See also Commonwealth v. Forbes, 85 Mass. App. Ct. 168, 174 (2014). Accordingly, the warrant here was executed in a timely manner.³

Order allowing motion to
suppress reversed.

By the Court (Meade,
Massing & Lemire, JJ.⁴),



Clerk

Entered: June 17, 2019.

² Officers applied for the warrant within ninety-six hours of the third controlled buy. The warrant was obtained on October 11, 2016 and executed on October 15, 2016. Thus, no more than eight days passed between the last controlled buy and the warrant's execution. We disagree with the defendant's argument that the affidavit failed to set out specific dates of when each controlled buy occurred.

³ To the extent that we do not address the defendant's other contentions, they "have not been overlooked. We find nothing in them that requires discussion." Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

⁴ The panelists are listed in order of seniority.